should make no more difference than it does in the case of a defrauded purchaser, or an infant. Both may avoid their transactions, yet both are accorded the benefit of the doctrine of purchaser for value. Therefore where the circumstances are such that the conscious acceptance of title is unnecessary, even though there be a right to repudiate, the automatic loss, also, of a valuable claim to restitution should be value as much as a conscious surrender.[12] Thus in a recent case where the wrongdoer who because of a previous misappropriation was under a duty to remove an assessment lien, did so by means of a forged check payable to the city collector, the owner of the property though ignorant of the lien was allowed to retain the benefit of its discharge as against the defrauded drawee. *Title Guarantee & Trust Co.* v. *Haven*, 139 N. Y. Supp. 207 (Sup. Ct., App. Div.).[13]

MARTIAL LAW. — Military jurisdiction is of three kinds.[1] The first may be called military law and consists of a body of rules governing the internal affairs of the army. By the United States Constitution the power to make these rules is expressly vested in Congress.[2] The second consists of those customs and treaties which govern dealings with belligerent armies and peoples and are recognized as a part of international law.[3] The third type is martial law, to which in time of need all persons may be subject, and which, it has been well said, "is nothing more nor less than the will of the general who commands the army."[4] In view of the universal demand for security to person and property which has everywhere expressed itself in the form of constitutional guarantees against interference with individual rights, it is often of the utmost importance to determine the source and scope of this arbitrary jurisdiction.

Unfortunately the authorities have taken conflicting views on these questions. In the leading case of *Ex parte* Milligan, Chief Justice Chase suggested that the United States Constitution gave Congress the power to declare martial law by implication from the powers to declare war,

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[12] By the better view the cancelation of a pre-existing debt constitutes value. The argument that the debt will be revived if the property is taken from the purchaser simply amounts to saying that the value can be restored, but there is no recognized principle that a purchaser for value shall not be allowed to hold property transferred to him if the value which he has given can be and is restored to him. See WILLISTON, SALES, § 620.

[13] Similarly, where a trustee misappropriates funds of one trust and later pays the *cestui* with funds of another trust, the *cestui* may keep the payment. Thorndike *v.* Hunt, 3 DeG. & J. 563; Taylor *v.* Blakelock, L. R. 32 Ch. 560.

Where bonds negotiable by delivery are stolen, sold to a *bonâ fide* purchaser, regained by fraud, and then restored to the original owner, he may keep them although he was ignorant of the whole transaction. London & County Banking Co. *v.* London & River Plate Bank, L. R. 21 Q. B. D. 535. *Cf.* Nassua Bank *v.* National Bank of Newburgh, 159 N. Y. 456, 54 N. E. 66.

[1] See *Ex parte* Milligan, 4 Wall. (U. S.) 2, 141, 142; LIEBER, THE JUSTIFICATION OF MARTIAL LAW, 1.

[2] Art. 1, § 8, cl. 14.

[3] See WILSON, HANDBOOK OF INTERNATIONAL LAW.

[4] See *In re* Egan, 8 Fed. Cas. No. 4303, by Nelson, J.

regulate the army, and suspend the writ of *habeas corpus*.[5] But the majority of the court took the view that martial law could be justified only by necessity at the actual seat of war where the civil authorities were incapable of action.[6] Following this line of thought to its logical conclusion, Sir Frederick Pollock has suggested that martial law is simply one application of the common-law doctrine which permits certain injuries to be inflicted because of public necessity,[7]—that doctrine by which the destruction of property to prevent the spread of a conflagration is justified. Of course the necessity need not have existed in fact. It is a sufficient justification that the actor reasonably believed it to exist.[8] Injuries to personal and property rights should be treated alike [9] in this respect; in either case the interference when thus justified should be regarded as due process of law.[10]

The practical difference between the two theories is very great. If Chief Justice Chase's theory were properly applicable to the case, the courts could give no remedy for the abuse of the power, as it is expressly vested in a coördinate branch of the government.[11] The only remedy would be by impeachment or at the polls. If martial law can be supported solely on the latter theory, however, the acts of a military authority are reviewable by the courts, immediately if they are in full operation; if not, as soon as civil tribunals are reëstablished. It was once thought that martial law could never be a justification in a district where courts were actually sitting.[12] But the modern cases are recognizing that the proper test is whether or not the civil authorities are competent to handle the situation.[13] Again, if authority can only be derived from a constitution, no matter how great the necessity might be, martial law

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[5] See *Ex parte* Milligan, 4 Wall. (U. S.) 2, 136, 141. It is to be observed that Congress undoubtedly has express authority to suspend the writ of *habeas corpus* "in cases of rebellion or invasion" when in its judgment public safety requires it. But the suspension of the writ merely justifies the detention of a prisoner duly arrested. It does not justify the arrest, trial, or punishment by military authorities. See *Ex parte* Milligan, 4 Wall. (U. S.) 2, 125, 126, 137.

[6] See *Ex parte* Milligan, 4 Wall. (U. S.) 2, 127.

[7] See 18 LAW QUARTERLY REVIEW, 152. But see 18 LAW QUARTERLY REVIEW, 133, where the other view is developed by Mr. H. E. Richards.

[8] See Mitchell *v.* Harmony, 13 How. (U. S.) 115, 135. In the case of a military necessity the fact that a superior officer ordered an act done would go a long way towards giving the subordinate reasonable cause to think a necessity existed.

[9] See 18 LAW QUARTERLY REVIEW, 133, 137.

[10] *Cf.* Moyer *v.* Peabody, 212 U. S. 78, 29 Sup. Ct. 235, in which it was held that the arrest and imprisonment of a striker under plea of martial law, if sustained by the state courts, did not violate the Fourteenth Amendment. It has long been settled that the guarantee to the states in the federal Constitution of a republican form of government will not prevent a state from declaring martial law. Luther *v.* Borden, 7 How. (U. S.) 1.

[11] See an article by H. C. Carbough, 7 ILL. LAW REV. 479, 481; LIEBER, THE JUSTIFICATION OF MARTIAL LAW; War Dep't, Document No. 79, pp. 6–11.

[12] See an article on the history of martial law by W. S. Holdsworth, 18 LAW QUARTERLY REVIEW, 117. *Cf.* Bean *v.* Beckwith, 18 Wall. (U. S.) 510; *In re* Egan, *supra*; *Ex parte* Milligan, *supra*.

[13] *Cf. In re* Boyle, 6 Ida. 609, 57 Pac. 706; *In re* Moyer, 35 Colo. 159, 85 Pac. 190; *Ex parte* Marais, [1902] A. C. 109. See 18 LAW QUARTERLY REVIEW, 152, 155. If the old rule is applied, the court finds itself in the absurd situation of having to issue a writ which it has no *posse commitatus* to enforce, and which it expects and hopes will be disobeyed. *Ex parte* Moore, 64 N. C. 802. *Cf. Ex parte* Merriman, Taney's Rep. 246.

could not exist in any state unless the constitution thereof by implication at least permitted the executive or legislative department to declare it.[14] In the constitutions of several states the bill of rights is expressly declared to have the same force in time of war as in time of peace. During the recent strikes in West Virginia, whose bill of rights contains this clause, the governor with the authority of the legislature declared martial law to exist, and caused rioters to be arrested and imprisoned by a military commission. It was held that necessity justified this action, and the writ of *habeas corpus* was refused though the constitution expressly declared that the writ should never be suspended. *State ex rel. Mays* v. *Brown*, 77 S. E. 243 (W. Va.). It is submitted that this result is sound. As necessity may justify an order to fire upon a mob, so it may justify imprisoning a rioter if the civil authorities are still incompetent to deal with his case. But for the reasons mentioned above the court seems utterly inconsistent in concluding that the governor's action was not reviewable.[15] The result of this view is to make the governor judge of the necessity of his own acts, thus nullifying all constitutional safeguards, and leaving the liberty of citizens subject to the caprice of a military despot.

THE LEGAL STATUS OF UNBORN CHILDREN. — The New York Appellate Division has recently laid down *obiter* the doctrine that a child may recover for prenatal injuries. *Nugent* v. *Brooklyn Heights R. Co.*, 139 N. Y. Supp. 367 (Sup. Ct., App. Div.).[1] In determining whether a child *en ventre sa mère* is a legal person with capacity for rights, it is helpful to examine the treatment accorded him in other departments of the law. He takes under a devise to children "living" [2] or "born" [3] at a given time. This does not, however, involve the recognition of a child *en ventre sa mère* as a separate existent entity, but is purely a rule of construction based on the ground that "such children come within the motive and

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[14] See *Ex parte* Milligan, 4 Wall. (U. S.) 2, 137, 141.

[15] Various executive civil officers are often given power to call out the troops to assist the police in keeping order and enforcing the civil law. The discretion of the officer in whom this power is vested is in such a case conclusive as to whether or not military assistance is necessary. Ela *v.* Smith, 5 Gray (Mass.) 121; Franks *v.* Smith, 142 Ky. 232, 134 S. W. 484. For this is a power vested in a coördinate branch of the government by the Constitution and laws of the United States or of the state, as the case may be, and the court has no right to substitute its judgment for that of the official to whom discretion is given. But this is a very different situation from that in the principal case, where the governor, acting in excess of his express powers, has arrested a citizen in disregard of civil law, and caused him to be tried by a military commission.

[1] In the particular case the injuries were inflicted by a carrier who was ignorant of the mother's pregnancy. The court denied recovery on the ground that the plaintiff was not a passenger. See Walker *v.* Great Northern Ry. Co. of Ireland, L. R. 28 Ir. 69. If the difficulties as to regarding the unborn child as a person could be overcome, it might well be argued that the known fact that a considerable portion of the female traveling public may be pregnant should justify the imposition on the carrier of a duty of care towards the infant.

[2] Doe d. Clarke *v.* Clarke, 2 H. Bl. 399.

[3] *In re* Salaman, [1908] 1 Ch. 4. *Enfants en ventres ses mères* do not, however, come within the description "children born" unless it is for their benefit. Villar *v.* Gilbey, [1907] A. C. 139.